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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1972

72-875

ROBERT SIEGEL and ARTHUR VEALS,

Petitioners,

THOMAS R. MC MILLEN,
Judge of the United States District Court,
and UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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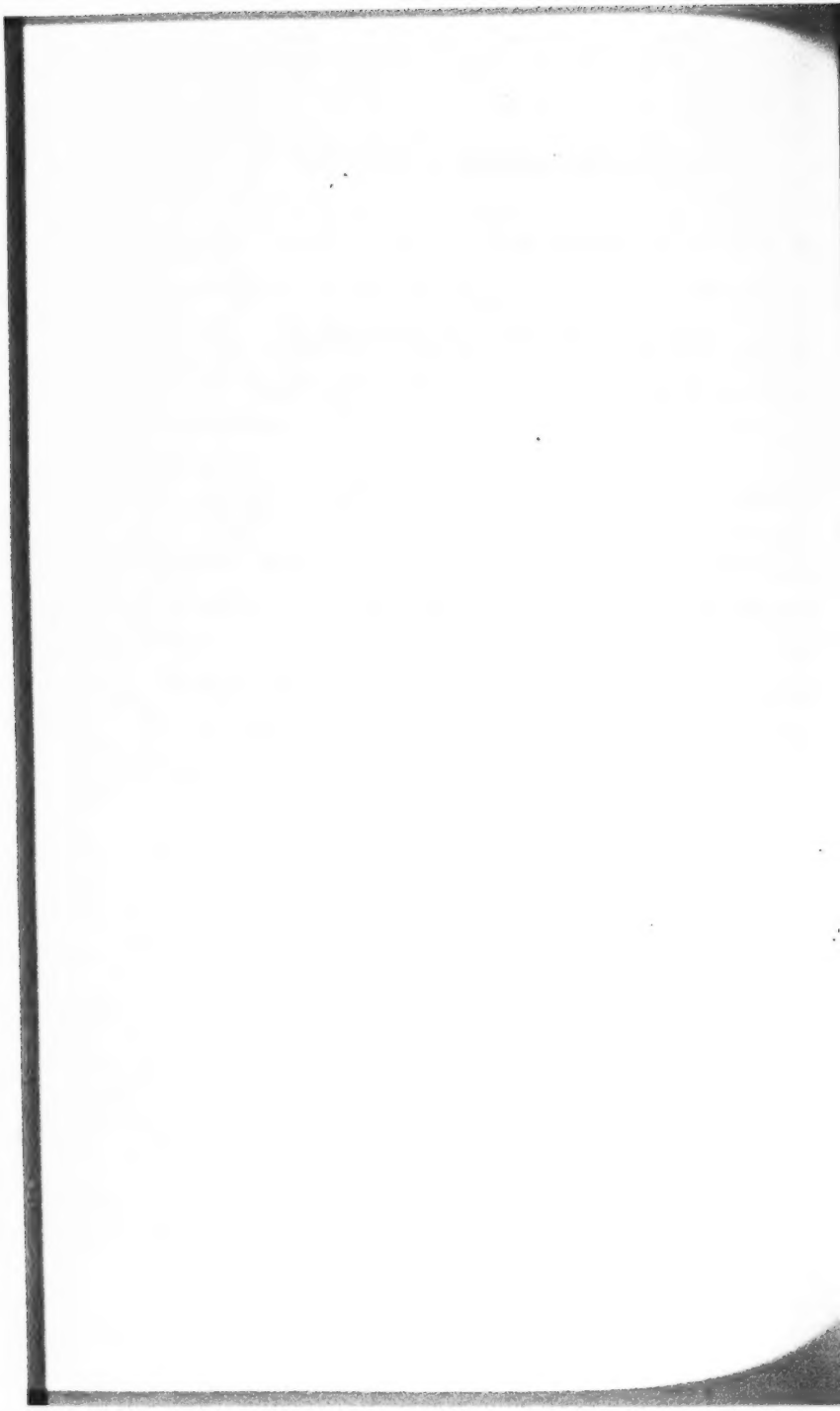

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In the Supreme Court of the United States

OCTOBER TERM 1972

NO.

ROBERT SIEGEL and ARTHUR VEALS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

May It Please the Court:

Petitioners Robert Siegel and Arthur Veals, by counsel, pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit for review of the Order entered by said Court on October 17, 1972 granting a writ of mandamus as therein set forth.

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A. Reference to Reports

The opinion of the Court of Appeals, review whereof is hereby sought, is reprinted as Appendix A. It is officially unreported to the present time.

The District Court entered two orders, neither of which has been reported officially. The order of March 24, 1972, directed that certain discovery be furnished. It is that order which was partially expunged by the Court of Appeals' mandamus writ. A second order, dated April 19, 1972, was entered on the motion of Petitioners for enforcement of the Discovery Order. Both orders are reprinted as Appendix B.

B. Statement of Grounds on Which Jurisdiction Is Invoked

1. The judgment of the Court of Appeals was entered on October 17, 1972.

2. Petition for Rehearing was timely filed, and was denied on November 14, 1972.

3. Jurisdiction with respect to this Petition is conferred by 28 U.S.C. Sec. 1254(1).

C. Questions Presented for Review

1. Does the "Jencks Act" (18 U.S.C. 3500) preclude all judicial discretion to compel pretrial disclosure of any part of the story of any person intended to be called as a prosecution witness, even though:

(a) No physical peril to the witness, or other consideration of security, could possibly be involved; and

(b) No substantive prejudice will result to the government; and

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(c) The unusual circumstances of the case present special necessity for such disclosure to facilitate trial preparation? Or

(d) The statements may consist in grand jury testimony? Or

(e) The statements may constitute an account of a statement or confession sought to be attributed to the defendant?

2. Is there any circumstance in which pretrial disclosure of any part of the statement of a prospective government witness, may properly be ordered by a district court?

3. What is the meaning of the following phrase as used in the Jencks Act and F. R. Crim. P. 16(b):

> "government witness or prospective government witness (other than the defendant)"?

4. Where the prosecution resists a defense request for pretrial disclosure of a witness statement, on the theory that the declarant *will not* be its witness,

And where, after limited disclosure has been ordered, the prosecution simply ignores that order,

May the prosecution then make a collateral attack on the order, claiming that the declarant *will* be a witness for the government?

If so, is the prosecution entitled to the extraordinary writ of mandamus to expunge that order?

5. Is a showing of diligence and of prejudice necessary where the prosecution petitions for mandamus to expunge a discovery order?

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D. Statutes Involved

Rule 16 of the Federal Rules of Criminal Procedure govern generally the right to discovery in criminal cases. Its text, so far as relevant, is set forth in Appendix C.

18 U.S.C.A. Section 3500, commonly referred to as the "Jencks Act" deals with the production of statements of government witnesses. It is recited verbatim in the Court of Appeals opinion, Appendix A, and is also reprinted in Appendix C, *infra*.

E. Statement of Facts

An indictment was returned on October 13, 1971 charging Petitioners Siegel and Veals, together with Robert Buss and three others, with a truck hijacking alleged to have occurred about two and a half years earlier. Count 1 charged a conspiracy to commit the hijacking, and Count 2 charged the substantive hijacking offense. Of the five overt acts charged against "the defendants", four were acts of Robert Buss in which defendant Siegel is not alleged to have participated directly. (A. 37-40).*

Siegel filed a timely discovery motion (A. 41) seeking *inter alia*, any statements given to the government by a co-defendant. He also filed a motion for relief from prejudicial joinder (A. 44-45).

In support of his discovery request, he cited the difficulty of reconstructing events alleged to have occurred more than two and a half years previously (A. 44). He also suggested that relief from prejudicial joinder might be necessary, if (as he could not then know) a co-defendant's confession

* The "A" reference relates to the Government's Record Appendix in the Court of Appeals.

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had inculpated him. In that behalf, he suggested that the statements of co-defendants be inspected *in camera* (A. 45-46).

The government responded: "Because the defendant has not shown a prejudicial joinder, the motion to require the government to produce statements of co-defendants should be denied." (A. 47) Siegel replied, characterizing that assertion as "silly" and stating that it would be impossible for him to show prejudicial joinder, absent disclosure of the government's statement. As he put it, "the government has simply put the cart before the horse." (A. 49)

On consideration of the motion, answer, and reply, the District Judge entered an Order, providing in relevant part:

> "1. Statements of all defendants which mention Robert Siegel in connection with this case should be produced forthwith * * *
>
> "3. The Motion for severance is denied insofar as any showing of prejudice to date is concerned. It may be renewed if justified by any statements or documents produced pursuant to this Order or otherwise." (A. 50)

That Order was entered on March 24, 1972 (A. 50). Twelve days earlier, trial had been set for April 24, 1972 (A. 31).

Counsel for Siegel immediately sought compliance with the discovery order. In that behalf he had several conversations with the prosecutor. Ultimately on April 12, 1972, he demanded production of the materials required by the order of March 24. The prosecutor then advised counsel that he would not comply with the order of the District Judge under any circumstances, and that if the court insisted upon production of those materials, "the government would appeal" (A. 51-52).

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Thereupon, Siegel moved to dismiss the indictment because of the prosecution's refusal to comply with the order of March 24 (A. 32, 31-52).

On presentation of that motion six days before trial, the prosecutor stated that "we are unable to comply" with the order because the defendant Robert Buss, "among others whose statements are being sought in this regard, will be a government witness". Thus, the prosecutor contended that the order was forbidden by 18 U.S.C. 3500 and "18 U.S.C. Section 16(b)" (A. 4). Asked whether he wished to file an answer to the motion to dismiss, the prosecutor relied on his original answer to the motions (A. 6).

The court took the matter under advisement, but directed that the case remain on the trial call for April 24 (A. 8, 32).

The District Judge stated that the government should have made its objections known earlier, rather than to wait until the defense moved for sanctions because of the government's refusal to comply with the order. The prosecutor explained that he had not known, until recently, that the government would not comply with the order. He stated that in a number of past cases, "your Honor has entered like orders which we have complied with . . . I think it is time that we perhaps determine the issue and see if we can comply with the court's order in this regard and then not do any disservice to the statutory language . . . " (A. 10). The Judge admonished the prosecutor that his actions "causes me to be without a case to try on Monday, or at least it might".

On the following day, (A. 32) the District Judge ruled on Siegel's motion to dismiss. He adverted to the fact that it was not until Siegel presented his motion to dismiss, that the prosecutor had advised the court for the

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first time that he would not comply with the Discovery Order. The Judge held that the government's request for an order of enforcement as a basis for appeal was not timely, coming twenty-five days after the order and less than a week before trial. He ruled that the government would not be permitted "to introduce into evidence any statement not produced" but that he would not dismiss the indictment because of the government's failure to comply with the order. It was ordered that the trial proceed as scheduled (A. 54).

When the case was called for trial, the prosecutor stated that the government could not proceed (A. 13-14). The prosecutor stated that he had already filed a Notice of Appeal (A. 14, 32), but "I would like a clarification": Would the government be prevented by the order of April 19, only from introducing the statement itself, or would it also be precluded from introducing testimony relating to the matters contained within such statements (A. 14-15). Counsel for Siegel pointed out that the statements, standing alone, were clearly inadmissible on any theory. The respondent Judge stated "I would assume" that any witness whose statements were withheld, would not be competent (A. 15). The prosecutor responded, "All right. That was the clarification that I need. Thank you." Respondent Siegel demanded trial (A. 16, 18). The court stated that it was ready for trial (A. 17) and stated that since the time had been reserved on the court's docket, he believed the case should proceed (A. 18). The prosecutor stated that he had no evidence against respondent Siegel except for the testimony of Buss (A. 8, 9, 16), and that he was unable to proceed (A. 17).

The District Judge again expressed displeasure with the prosecutor's actions in not moving promptly for clarification or vacature of the discovery order, and waiting

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until shortly before the trial to advise the court that he would not comply with the order. "I think in effect they are doing it just delaying for time * * * I can't condone that kind of conduct on the part of the government. It leaves me without a case to try today." (A. 18) Counsel for Siegel questioned whether the order of April 19 was appealable on any theory (A. 16). The trial judge stated that he did not believe that the Notice of Appeal was proper or that the government had the right to take such an appeal (A. 17). The prosecutor responded, "Well, the Court of Appeals, I assume, will decide that for us" (A. 17).

At the prosecutor's request, the case was postponed for thirty days in order, as he put it, to "see if the Court of Appeals can act by then, and we will have a decision" (A. 19).

When the case was next called, the government moved for a further 30-day extension within which to docket the record on appeal. At the expiration of that month, they moved for a further extension (A. 36). On the last day of the final extension, the appellate record was filed in the Court of Appeals.

No further action was taken on that appeal. Instead, three weeks later, the government filed its Petition for Writ of Mandamus.

Petitioner Veals timely adopted the motion originally made by Petitioner Siegel in the trial court, and subsequently joined in Petitioner Siegel's answer to the mandamus petition. Siegel and Veals were treated as Respondents in the Court of Appeals, pursuant to the provisions of Rule 21(b) F. R. App. P. The District Judge formally addressed the Court of Appeals, expressing con-

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currence with the position expressed in answer opposing mandamus.

On consideration of the Petition and Briefs, and without hearing argument, the Court of Appeals granted mandamus. It agreed that Petitioners (respondents below) were entitled to pretrial inspection of the statements of all other co-defendants. However, the Court of Appeals noted that the government had stated that co-defendant Buss "is the only co-defendant named by the government as a prospective witness for the government", and that "the government has admitted that without Buss' testimony it cannot establish its case." Accordingly, mandamus was issued "to deny defendants' access to Robert Buss' statements until he testifies at the trial."

In the trial court, the government expressly admitted that the furnishing of Buss' statement would not imperil his security (A. 8). At no time was there any showing that any special prejudice would inure to the government through compliance with the discovery order. The only stated basis for unwillingness to comply with the order, was that "defendant has not shown a prejudicial joinder" (A. 47).

The government did not disclose that Buss might be its witness, until Petitioners sought enforcement of the District Court's discovery order, nor did the government move in the trial court for vacature or modification of the discovery order. When the District Court inquired whether the prosecutor desired to answer Petitioner's motion for enforcement, the prosecutor declined and elected to rely on his original answer which had dealt only with the subject of prejudicial joinder. Ultimately, the court stated that it would rely only on the written sub-

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missions of the parties. The prosecutor replied, "Fine, that is all we want, your Honor." (A. 8).

The record does not support the Court of Appeals' statement that the District Judge "intends to force this cause to trial and then to invoke his power under Rule 16(g) Fed. R. Crim. P. to prevent the testimony of Buss from being presented." Petitioners had suggested that such remedy was appropriate in the circumstances; but the District Court refused that request, and extended to the government ample time for appellate review. In fact, the prosecution received extensions totalling almost three months for the filing of a simple common-law record with a brief transcript of colloquy on two motions. A month later, it abandoned its appeal and petitioned for mandamus. Throughout that period, the District Judge took no step to force the case to trial. At all stages, the government was (and still is) free to comply with the discovery order and proceed to trial without restriction.

F. Review of State Proceedings

No state judgment or order is involved in this case. The proceedings below were exclusively federal in character.

G. Basis of Federal Jurisdiction

These proceedings were commenced on an indictment returned by a federal grand jury before a District Court Judge, charging violation of federal statutes. Federal jurisdiction has never been challenged.

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REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The order entered in this case, must have a profound impact upon every federal prosecution in the Seventh Circuit, and a strong inferential impact in all other circuits.

The order below, is probably the first holding by any circuit that construes the Jencks Act as foreclosing *all* judicial discretion, regardless of the circumstances of any given case. Even the strictest interpretations of the Jencks Act, have always conceded some area of judicial discretion. Thus, for example, *United States* v. *Montos* (5 Cir. 1970) 421 F.2d 215, 221, held that the basic fairness doctrine of *Brady* v. *Maryland* does not overcome the limitations of the Jencks Act for purposes of pretrial hearings on motions to suppress. But *Montos* is clearly limited to suppression hearings, and its clear implication is that the Jencks Act does not present a bar to *all* pretrial disclosure of witness statements. (*Montos* is completely in accord with this Court's holding in *Rugendorf* v. *United States* (1964) 376 U. S. 528, 533-534, which adopts as the test on motions for suppression a balancing of the public interest in withholding disclosure against the narrow interest of the defendant in obtaining it.)

There are many additional examples of strict interpretations of the Jencks Act which have expressly or inferentially denied the existence of an absolute bar to discovery.

United States v. *Harris,* (5 Cir. 1962) 458 F.2d 670, in affirming the denial of pretrial disclosure of a witness statement requested under a *Brady* claim, held that "the defense is not *automatically* entitled under a *Brady* theory to disclosure of a Jencks Act statement prior to the direct

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testimony of the government's witness." (458 F.2d at 676, emphasis supplied) The *Harris* court assumed, however,

> "that *Brady* and the Jencks Act might in some circumstances be in substantive conflict on the issue of production of government evidence."

Obviously, no such conflict was found in *Harris;* but with equal certainty, the *Harris* court recognized that the Jencks Act was not an absolute bar to all pretrial disclosures.

Another example is *United States* v. *Cole* (8 Cir. 1972) 453 F.2d 902. The *Cole* court stated that denial of pretrial discovery of a witness statement "under these circumstances . . . was not an abuse of discretion."

But no reviewing court has ever before held that no discretion exists — that *no* pretrial discovery of the statement of *any* person whom the government might call as a witness is possible under *any* circumstances.

And most certainly no court has ever before suggested, in the very teeth of *Will* v. *United States* (1967) 389 U.S. 90, that a criminal proceeding may be suspended while the prosecution seeks mandamus to expunge a discovery order, in the absence of any suggestion of substantive prejudice to the government or peril to the witness deriving through that order.

• • •

Federal courts have always assumed discretion to tailor discovery to the specific circumstances of the case. The procedural aspects of discovery "must be entrusted to the good sense and experience of the trial judges subject to appropriate limited review of appellate courts." *Campbell* v. *United States* (1963) 373 U.S. 487, 507; *United States* v. *Augenblick* (1969) 393 U.S. 348, 355.

Absent such discretion, the courts are literally hamstrung. Every judge or lawyer with experience in criminal

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cases, has chafed under the restrictions, *sometimes* necessary, imposed by a literal reading of the Jencks Act. Where the prosecutor is obstinate, a recess ranging from ten minutes to several hours must be declared after the direct testimony of each government witness, in order that his pretrial statements, however voluminous, may be inspected on the spot. These interminable recesses and interruptions have caused many courts to require production of such statements *before* the witness takes the stand. See, e.g. *United States* v. *Skarloff* (S.D. Fla. 1971) 325 F.Supp. 296, 309.

It was in this light, that the Chief Judge for the Southern District of Indiana stated:

> "Each case is sui generis when it comes to determining the time at which, the means by which, and the extent to which discovery is to be permitted." *United States* v. *Westmoreland* (S.D. Ind. 1967) 41 F.R.D. 419, 424.

Westmoreland holds that pretrial production of the statements of a co-defendant will be compelled if necessary to resolve the issue of prejudicial joinder, or if material to preparation of the substantive defense. 41 F.R.D. 427. The *Westmoreland* opinion notes that *Dennis* v. *United States* (1966) 384 U.S. 855, "reflects the court's general attitudes toward broader discovery in criminal cases and should be kept in mind in ruling on motions of the type here presented." In the light of *Dennis*,

> "the interplay of the Jencks Act, Rule 6(e), the Brady doctrine, and now Rule 16, is apparent." (41 F.R.D. at 422-423)

Grand jury testimony, although theoretically governed by the Jencks Act (*United States* v. *Westmoreland, supra,* 41 F.R.D. 419, 423) is nonetheless routinely disclosed prior to trial when cause is shown. (*Dennis* v. *United States*

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(1966) 384 U.S. 855, 870; *United States* v. *Hughes* (5 Cir. 1969) 413 F.2d 1244, 1255) This right is conceded to exist at the pretrial stage, even by those courts which have adopted a restrictive view of Rule 16 and of the Jencks Act. See e.g., *United States* v. *Gardner* (S.D. N.Y. 1969) 308 F.Supp. 425, 428 and *United States* v. *Mahaney* (N.D. Ill. 1969) 305 F.Supp. 1205, 1209.

* * *

The opinion below, runs directly contrary to every discernible judicial trend, and to the philosophy expressed by this Court. It would forbid such obviously salutary procedures as those recently employed in the United States District Court for the Southern District of California. That court adopted, on an experimental basis, the American Bar Association *Standards on Discovery and Procedure Before Trial,* which would require *routine* disclosure of *all* witness statements, a discovery concept far more broad than anything granted by the trial judge in the case at bar.[1] The Southern District of California leads the nation in volume

[1] Section 2.1 Prosecutor's obligations

(a) Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;

(ii) any written or recorded statements and the substance of any oral statements made by the accused, or made by a co-defendant if the trial is to be a joint one;

(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial; * * *

[The exceptions of section 2.6 relate to attorney's work product, confidential informants whose very identity is secret, and national security cases.]

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of criminal cases. The experiment commenced in 1966. The United States Attorney for that District has expressed approval of the procedure, noting that it has rendered the criminal trial calendar substantially more manageable. *Miller, The Omnibus Hearing,* 5 San Diego Law Review 293 (1968). The procedure is still in effect, with the obvious approval of the Court of Appeals for the Ninth Circuit. *United States* v. *Contreras,* (9 Cir. 1972), 463 F.2d 773, 774. The judges of the Southern District of California reported that the procedures

> "appear to be working well and fulfilling the objectives sought: Increasing the efficiency of the judges and lawyers, speeding up the process, improving the performance of defense counsel, eliminating a substantial amount of paper work, making trials shorter and more to the point, and increasing the number of guilty pleas — all apparently without any sacrifice of the interests of the government or of the defendant." *(Committee Report, ABA Project on Standards for Criminal Justice, Advisory Committee on Pretrial Proceedings, p. 9)*

That is precisely the result envisioned by this Court's opinion in *Williams* v. *Florida* (1970) 399 U.S. 78. We particularly note the concurrence of the Chief Justice, who stated (399 U.S. 105) that pretrial disclosures "will serve appropriate functions by way of disposing of cases without trial in appropriate circumstances—a matter of considerable importance when courts, prosecution office, and legal aid and defender agencies are vastly overworked."

The ABA Committee considered at length the key decisions, statutes and authorities relating to discovery (Committee Report, esp. pp. 56-65) and concluded that the administration of justice and the concept of basic

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fairness required such disclosure. The committee stated (*Report*, p. 56) that one of the chief aims of discovery was to advise one's opponent of evidence to be produced at the trial,

> "so that he can most effectively test its validity. The most direct means to this end is to require that the material to be produced at trial be disclosed in advance."

The opinion below would preclude all such thoughtful and necessary experiments as that conducted in the Southern District of California using the proposed ABA Standards. Such actions now become forbidden throughout the Seventh Circuit. There remains only a flat prohibition against all such pretrial disclosures, operative without regard to the circumstances of any case, and enforceable by mandamus. That which is mandatory in California, is prohibited in Illinois, Indiana and Wisconsin.

The trial court below proposed no broad experiment. It did no more than to accept this Court's invitation to employ its "good sense and experience" (*Campbell* v. *United States*, 373 U.S. 487, 507; *United States* v. *Augenblick* (1969) 393 U.S. 348, 355). The special circumstances of the order expunged below, deserve mention.

Petitioner was indicted on October 13, 1971 (A. 26) for an offense allegedly committed on May 16, 1969 (A. 37). The indictment was his first notice of any claim of complicity in the offense (A. 49)—and, presumptively, of the fact that any such offense had ever been committed. The problem of reconstruction of events two and a half years past, is obvious.

He moved that statements made by any co-defendant with whom he was to be tried, be disclosed to him (A. 43), suggesting that such statements may contain exculpatory material and investigative leads (A. 43).

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The government responded that such disclosures should be denied "because the defendant has not shown a prejudicial joinder" (A. 47). The defendant replied that it was "silly" to imagine that he could show prejudicial joinder, absent disclosure of the statements of co-defendants (A. 49).

The district judge did not order disclosure of all statements made by Buss; his order was limited to those statements by Buss "which mentioned (petitioner) in connection with this case" (A. 50).

The order was predicated upon the possibility that such statements "could be exculpatory or * * * could be tantamount to a confession * * *". (A. 53)

Up to that time, nobody had intimated that any co-defendant might be a government witness. It would seem in questionable taste, to say the least, that the government should indict as a co-defendant the man whom it secretly knows to be "a government witness" (A. 4) without whom "we could not meet our burden of proof", (A. 9) and who "has in fact been in protective custody for some period of time" (A. 7). It is one thing to deny information to a defendant; it is quite a different thing, deliberately to mislead him.

The trial judge was no less misled than were Petitioners. The prosecutor argued before him, that pre-trial discovery should be withheld because Buss would be standing trial as a co-defendant with Petitioners. When that obscure logic was rejected by the trial judge, the prosecutor said nothing. Much later, he resisted enforcement of the Discovery Order on the ground that Buss would be a government witness at Petitioners' trial.

Nothing could be more directly inconsistent with the suggestion that Buss would be a government witness, than

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the original vigorous contention by the prosecution that Buss could properly be tried together with the petitioners. Obviously, a co-defendant cannot be a government witness at a joint trial.

Thus, the government resisted the entry of the Discovery Order on a theory diametrically opposed to that on which it has obtained mandamus to expunge that Order.

We would not have thought such conduct possible. We would not have dreamed that it could be rewarded with the grant of mandamus. *Will* v. *United States* (1967), 389 U.S. 90.

The government's lack of candor in the trial court hardly justifies the award of the extraordinary remedy of mandamus. Moreover, the government never moved to vacate the Discovery Order; it merely resisted enforcement on the grounds that the order was improper for a reason never previously disclosed. Its position, in that regard, is no different from that of the petitioner in *Walker* v. *Birmingham* (1967), 338 U.S. 307, 320. One cannot simply ignore a court order and subsequently attempt to justify his actions by a collateral assertion that the order was erroneous. *Howat* v. *Kansas* (1922), 258 U.S. 181, 189-190; *United States* v. *United Mine Workers* (1947), 330 U.S. 258, 293.

• • •

Moreover, the Petitioners were clearly entitled to pretrial disclosure of any record of any statement attributed to them. F. R. Crim. P. 16(a). Thus, any recorded assertion by Buss that Petitioners had said anything to him concerning the offense, was clearly producible. The least that the government owed the court, was an *in camera* inspection of the Buss statements in order that those por-

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tions disclosing statement by Petitioners could be divulged as required by Rule 16.

The Court of Appeals has held that no disclosures were proper, because Buss will be a government witness. But *any* "statements or confessions made by the defendant" in any case, can only be proved through the testimony of some government witness. Thus, a truly literal reading of the Jencks Act, as required by the opinion below, will necessarily deprive all defendants of access to records of claimed statements and confessions, possibly excepting only those which are formally signed but not witnessed. Absent such a bizarre concurrence, the defendant's statements and confessions will be withheld on the ground that they really constitute statements by government witnesses about things which the defendant has said. Precisely that result is implicit in the order of the Court of Appeals.

In that aspect, the Jencks Act and Rule 16 express an incongruity which may only be superficial. Facially, they forbid disclosure of statements ". . . made by a government witness or prospective government witness (other than the defendant) . . ." But obviously the defendant could not possibly be made a government witness at his own prosecution.[2] The Fifth Amendment flatly prohibits

[2] Conceivably, he might be a government witness in a *different* case. Such an interpretation, however, would be absurd. It cannot be imagined that the Statute and Rule forbid disclosure of a statement by a non-witness declarant if that declarant also happens to be a "prospective government witness" in an unrelated prosecution; nor could there ever be an entitlement to a statement by *any* witness concerning such irrelevant matters. Moreover, the contested prosecution of a defendant who is also a prospective government witness, is hardly so common an event as to become a matter of special Congressional concern.

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such a tactic, quite independent of any claim of self-incrimination. Yet, the literal reading of the Statute and Rule required by the Court of Appeals, would mean that the defendant is entitled to pretrial disclosure of his own statement if he is himself to be a witness for the government at the trial—a wildly anomalous result, to say the least.

The surface incongruity disappears, however, when the legislative intent is viewed realistically. If a given area of disclosure might prejudice some legitimate right of the prosecution, the Congressional intent to protect that right would seem clear. On the other hand, neither Congress nor this Court can have intended to encourage trickery or basic unfairness.

We suggest that the Jencks Act and Rule 16 proceeded on the assumption that when the government indicts a citizen it does so pursuant to a good-faith prospective intent—not, as in this case, as a device for dissembling concerning the identity of its witness.[3] The predicate of the Statute and the Rule might well be that the pre-trial statement of *any* defendant, whether movant or co-defendant, is outside the prohibition of the Jencks Act. That approach not only reflects the most reasonable interpretation of the language employed in the Statute and Rule, but would discourage the prospective tactic employed in this case. The tactic richly merits proscription. As employed in this case, it not only misled Petitioners, but literally entrapped the trial judge into a mandamus situation.

• • •

[3] "It was ultimately disclosed that Buss had "been in protective custody for some period of time, some several months" (A. 7). Thus, his co-indictment with Petitioners, and the government's original argument that the defendants had been properly joined, was not a device for the protection of Buss. It was simply a trick.

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Certainly, it was well within the discretion of the trial judge to have ordered production of any statements given by Buss to a grand jury. *Dennis* v. *United States* (1966) 384 U.S. 855, 870. Obviously, it is unknown at this time whether Buss' statement took the form of grand jury testimony or of informal conversation with agents. His status as a prospective government witness, was deemed to preclude even that much of an inquiry. Thus, in a single stroke, *Dennis* and F. R. Crim. P. 6(e) are emasculated.

• • •

The precedent established below will substantially impair the right of a defendant to pretrial disclosure of statements or confessions attributed to him, contrary to the express requirements of Rule 16. It will preclude all pretrial disclosure of grand jury testimony, contrary to *Dennis* and to established practice. All that, in the name of secrecy for the sake of secrecy.

The holding below will unduly restrict trial preparation, working its greatest hardship in the case of the truly innocent defendant. Discovery is forbidden completely, even in the most compelling of circumstances—not in furtherance of any substantive right of the prosecution, nor in deference to any consideration of public interest, but only to provide a tactical advantage to the government by making prosecution easier and defense more difficult.

Nothing could be more at odds with the concept of the trial as a fact finding function, or with the current salubrious tendency toward disclosure.

This case presents the precise converse of the situation faced by this Court in *Rugendorf* v. *United States* (1964), 376 U.S. 528, 533-534. Here, the prosecutive interest in withholding information is of the narrowest possible di-

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mension; the interest of the defendant in obtaining that information, could hardly be more broadly compelling. Here, the balancing of interests envisioned by *Rugendorf* weighs strongly and heavily in favor of disclosure.

It cannot be, that a litigant is entitled to trick and entrap a trial judge into the entry of an order which may then be expunged by mandamus on different and inconsistent grounds.

It cannot be, that the intent of the Jencks Act and of Rule 16 was to endow a prosecutor with a totally arbitrary position, characterized by circular and tautological reasoning: "We are entitled to secrecy because we want it, and we want it because we are entitled to it."

It cannot be, that a rule will be enforced by mandamus in a situation never contemplated by that rule, presenting no reason for its application. It has always been the philosophy of the law that where the reason underlying a rule is shown to have failed, the rule itself will be held inapplicable. A contrary approach is the very definition of fanaticism.

It cannot be, that the law is so one-sided as that.

We pray for the corrective Writ of Certiorari.

Respectfully submitted,

MELVIN B. LEWIS
Attorney for Petitioner Robert Siegel
JEROME ROTENBERG
Attorney for Petitioner Arthur Veals

APPENDIX

APPENDIX A

Order of the Court of Appeals Presented for Review

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
October 17, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

No. 72-1648

UNITED STATES OF AMERICA,

Petitioner,

vs.

HON. THOMAS R. McMILLEN, Judge United States District Court, etc.,

Respondent.

Original Petition for Writ of Mandamus
(71 CR 592) — Judge McMillen

ORDER

This case is before us on the Government's petition for a writ of mandamus directed to respondent district judge.

The October 1971 Grand Jury indicted Robert Siegel, together with Robert Buss and four others, charging them

in two counts with conspiracy to hijack and hijacking certain goods in violation of §659 of Title 18 of the United States Code. The criminal case was assigned to the respondent judge. On December 20, 1971, the defendant Siegel made a pre-trial motion for discovery which asked that the Government be ordered to produce "statements made by any co-defendant hereto, together with whom defendant Siegel is intended to be tried . . ."

On March 24, 1972 Judge McMillen ordered that the Government produce "[s]tatements of all defendants which mention Robert Siegel in connection with this case . . ." Subsequently, the Government refused to comply with respondent's order. Trial was ordered to proceed as scheduled, but the Court indicated that it would exercise its discretionary power under Rule 16(g) Fed. R. Crim. P. to prohibit the Government from introducing into evidence the statements which were not produced.

The Government filed a petition for issuance of a writ of mandamus on August 4, 1972. The petition asks this Court to order Judge McMillen to vacate his order of March 24, 1972. We grant the writ of mandamus and direct the respondent to modify his order to deny the defendants access to statements made by Robert Buss to the Government until such time as Buss has testified on direct examination.

Section 3500 of Title 18 provides:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. 18 U.S.C.A. §3500 (Cum. Supp. 1972).

The prohibition of §3500 is engrafted on Rule 16(b) of the Fed. R. Crim. P. The Government relies on these prohibitions in refusing to comply with respondent's order and in seeking a writ of mandamus.

We agree that Rule 16(b) and §3500 prohibit a district judge from ordering production of statements of Government witnesses, whether or not they are co-defendants, before they have testified. Robert Buss is the only co-defendant named by the Government as a prospective witness for the Government.

We realize that the writ of mandamus is an extraordinary remedy reserved for extraordinary circumstances. *Will* v. *United States,* 389 U.S. 90, 107 (1967). On the record before us two grounds appear which bear the weight of justification for this writ. First, the writ is necessary to confine the district court to a lawful exercise of its prescribed jurisdiction. Jurisdiction in this context is not limited by a "technical definition" but rather encompasses judicial usurpation of power. *Will* v. *United States, supra* at 95. Secondly, on the record it appears that the respondent intends to force this cause to trial and then to invoke his power under Rule 16(g) Fed. R. Crim. P. to prevent the testimony of Buss from being presented. The Government has admitted that without Buss' testimony it cannot establish its case. Without mandamus, the Government would be remediless.

Mandamus will prevent the respondent from "usurping power" by ignoring the prohibition of the Jencks Act. The legislative history of the Act leaves no doubt that a statement of a Government witness cannot be discovered until after he testifies. The Senate Report on the Jencks Act contains the following declaration:

> [I]t is the specific intent of the bill to provide for the production of statements, reports, transcriptions or recordings, as described in the bill, after the Government witness has testified against the defendant on direct examination in open court, and to prevent disclosure before such witness has testified. S. Rep. No. 981, 85th Cong. 1st Sess. (1957).

The Conference Report provides:

> The changes agreed upon by the conferees . . . (3) make it abundantly clear that no such statement need be produced until said witness has testified on direct examination in the trial. Conf. Rep. No. 1271, 85th Cong. 1st Sess. (1957).

Since initial passage, the Act has been amended only to expand the coverage of the prohibition. 18 U.S.C.A. §3500 (Cum. Supp. 1972); Cf. H. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970). Moreover, §3500 has repeatedly withstood Constitutional challenge. *E.g., Palermo* v. *United States,* 360 U.S. 343 (1958).

The Act limits the prohibition to Government witnesses or prospective Government witnesses. The prosecution has stated that co-defendant Buss is its only witness or prospective witness that will be called against the two remaining co-defendants Robert Siegel and Arthur Veals.[1] We agree with respondent that defendants are entitled to the statements of any other co-defendants. 8 J. Moore, Federal Practice ¶16.03[2], at 16-24 (2d ed. 1953); and Rezneck *The New Federal Rules of Criminal Procedure* 54 Geo. L.J., 1276, 1286 (1966). Accordingly the writ shall issue to deny defendant's access to Robert Buss' statements until he testified at the trial.

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[1] The record indicates that George Beecher, a co-defendant, was permitted on February 17, 1972, to join in Siegel's motion for discovery. However, Beecher was subsequently severed from Siegel and found guilty of the crimes charged on May 15, 1971. This matter is therefore moot as to Beecher.

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APPENDIX B

Trial Court Orders

1. Discovery Order

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PAGONE, ANTHONY LA BARBERA, ROBERT SIEGEL, GEORGE BEECHER, ARTHUR VEALS, and ROBERT BUSS

Defendants.

— No. 71 CR 952 —

ORDER

The Motion of the defendant Robert Siegel for Discovery and Production is granted in the following respects:

1. Statements of all defendants which mention Robert Siegel in connection with this case should be produced forthwith.

2. All other items requested in said motion should be produced forthwith, if and when obtained by the government, since no objection has apparently been raised thereto.

3. The Motion for Severance is denied insofar as any showing of prejudice to date is concerned. It may be re-

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newed if justified by any statements or documents produced pursuant to this order or otherwise.

Enter:
/s/ Thomas R. McMillen
Judge, U. S. District Court

March 24, 1972

2. Order on Motion for Enforcement of Discovery

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PAGONE, ANTHONY LA BARBERA, ROBERT SIEGEL, GEORGE BEECHER, ARTHUR VEALS, and ROBERT BUSS

Defendants.

—No. 71 CR 952—

ORDER

This cause comes on to be heard on motion of the defendant Robert Siegel to dismiss the indictment, or for other appropriate relief, on the grounds that the government has refused to comply with this court's order to produce entered March 24, 1972. Defendants Beecher and Veals have joined in this motion, on the ground that they had orally joined in defendant Siegel's motion to produce and that the government has not complied with the order with respect to them either. The government does not contest

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the foregoing representations of the defendants, with the result that this court's order of March 24, 1972 applies to their motions as well as to defendant Siegel's. The government also does not deny its refusal to comply as to all three defendants, although it admittedly has statements which are covered by the order.

The indictment in this case charges a conspiracy among these three defendants and three other defendants to possess certain goods stolen from interstate commerce, with a substantive count against all defendants charging possession of said goods. The case against three defendants has apparently been disposed of, and the trial of the remaining three defendants (movants herein) is set for Monday, April 24, 1972.

The remaining three defendants originally moved for severance on the grounds of prejudicial joinder and also moved for an *in camera* inspection of any statements made by co-defendants. After the matter was submitted on briefs, the court ordered the government to produce such statements to the extent that a defendant's statement mentioned the moving defendant. This order was based on F.R.Cr.P. 16(b), in that the statements were material to the motion to sever and to the defense and that the request was reasonable under the circumstances of this case. It seems self-evident that a defendant in a conspiracy case should be permitted, upon request, to examine statements of alleged co-defendants in order to evaluate and prepare a defense (or even a change of plea) and in order to have material which might be helpful to the defendant. The statements of co-defendants could be exculpatory or, in a conspiracy case, they could be tantamount to a confession of one or more of the remaining defendants.

The government took no further court action in this matter after this court's order of production was entered

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on March 24, 1972. When defendants filed their pending motion to dismiss on April 18, 1972 the government for the first time advised the court that it would not comply. The government attorney stated that his office considered these statements to be privileged from production in advance of trial under Rule 16(b) because they were statements made by government witnesses or prospective government witnesses, to-wit co-defendants who have pleaded guilty. The government therefore stated that it wished to appeal from the court's order of production and requested the court to enter an order of enforcement.

Obviously the government's request is not timely, coming 25 days after the order and less than a week before trial. Cf. F.R.Cr.P. 16(e). Furthermore the court does not consider the government's request to be well-founded. Although the court would not allow the government to introduce into evidence any statement not produced (F.R.Cr.P. 16(g), no additional order is required. On the other hand, the court does not believe an indictment should be dismissed on nothing more than defendants' motion for failure to comply with Rule 16(b) unless this failure results in acquittal of the defendant. The indictment has not been challenged by defendants except by their pending motion which does not go to the sufficiency of the indictment.

Therefore the court has no realistic alternative at this time except to deny the defendants' motion to dismiss and to proceed with the trial of this case as scheduled.

Enter:

/s/ Thomas R. McMillen
Judge, U. S. District Court

April 19, 1972

APPENDIX C

Statute and Rule

Rule 16, Federal Rules of Criminal Procedure

DISCOVERY AND INSPECTION

(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or in-

spection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

• • •

(e) *Protective Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing in *camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

• • •

(g) *Continuing Duty to Disclose; Failure to Comply.* If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit

the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

• • •

Title 18 U.S.C. Section 3500

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

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APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
November 14, 1972

BEFORE

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA,

Petitioner,

No. 72-1648 vs.

HON. THOMAS R. McMILLEN, Judge, U. S. District Court, etc.,

Respondent.

Original Petition for Writ of Mandamus.
(71 CR 592)

ORDER

On consideration of the petition of respondent, Hon. Thomas R. McMillen, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing.

IT IS ORDERED that the petition of the respondent for a rehearing in the above-entitled appeal be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-875

ROBERT SIEGEL AND ARTHUR VEALS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of an order granting a writ of mandamus compelling a district judge to modify a pre-trial discovery order that violated the Jencks Act and Rule 16(b) of the Federal Rules of Criminal Procedure.

On October 13, 1971, a grand jury in the Northern District of Illinois returned an indictment which alleged that on May 16, 1969 petitioners, along with Robert Buss and three other persons [1] had possessed cigars and contraceptive devices known to have been stolen from a trailer at a Chicago railroad depot, and

[1] Buss and two other defendants, Joseph Pagone and Anthony La Barbera, pleaded guilty. Another defendant, George Beecher, was severed and found guilty after a jury-waived trial.

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part of an interstate shipment, in violation of 18 U.S.C. 659 (count 2) and had conspired to commit that offense in violation of 18 U.S.C. 371 (count 1). On December 20, 1971, petitioner Siegel filed a pretrial motion for discovery which included a request for the government to produce any statements by his co-defendants. On March 24, 1972, after co-defendant Buss had pleaded guilty on February 2, 1972, Judge McMillen entered an order (Pet. App. 5-6) requiring the government to produce "[s]tatements of all defendants which mention Robert Siegel in connection with this case." When the government did not produce any statements, petitioner Siegel, joined by petitioner Veals, moved to dismiss the indictment. At that time the government informed the court that, with respect to co-defendant Buss, it was unable to comply with the disclosure order because Buss would be a government witness at trial and as such—under 18 U.S.C. 3500 (the Jencks Act) and Rule 16(b)—his statements could not be the subject of discovery until he testified on direct examination (A. 4).[2] Judge McMillen, in an order entered April 19, 1972, denied the motion to dismiss. However, on April 24, 1972, the day set for trial, he informed the prosecutor that he would not allow the government to place Buss on the stand if his prior statements had not been given to petitioners (A. 15).

The government petitioned the court of appeals for a writ of mandamus directing Judge McMillen to

[2] "A." refers to the appendix to the government's petition for a writ of mandamus in the court of appeals, which we are lodging with the Clerk of this Court.

vacate his order of March 24, 1972. The court of appeals, on October 17, 1972, granted the writ and directed the judge to modify his order so as to deny petitioners access to co-defendant Buss's statements until he testifies at trial. Petitioners contend that the court below erred in granting the writ. The court below has adequately dealt with this issue and for the reasons set forth in its opinion (Pet. App. 2–4), upon which we mainly rely, it is urged that the petition for a writ of certiorari should be denied.

We add only these further comments. This case does not involve the exercise of discretion by a district judge; rather it involves an unequivocal statute which the court below correctly held governed this case and denied the judge the power to enter the order he issued. Moreover, although the petition for mandamus was directed to the discovery order, the action of the district court which gave rise to the petition for mandamus was the decision to suppress the testimony of a witness because of the government's failure to comply with the discovery order. As petitioner states (Pet. 7):

> When the case was called for trial, the prosecutor stated that the government could not proceed (A. 13–14). The prosecutor stated that he had already filed a Notice of Appeal (A. 14, 32), but "I would like a clarification": Would the government be prevented by the order of April 19, only from introducing the statement itself, or would it also be precluded from introducing testimony relating to the matters contained within such statements (A. 14–15). Coun-

> sel for Siegel pointed out that the statements, standing alone, were clearly inadmissible on any theory. The respondent Judge stated "I would assume" that any witness whose statements were withheld, would not be competent (A. 15). The prosecutor responded, "All right. That was the clarification that I need. Thank you." • • •

Under 18 U.S.C. 3731, a "decision or order of a district court suppressing or excluding evidence," may be appealed by the United States. This case, therefore, does not implicate the Congressional policy against "piecemeal appeals" present in *Will* v. *United States,* 389 U.S. 90, 96, a case involving a discovery order from which no direct appeal could be taken. Here, although styled on application for mandamus, the proceedings below were in substance the same as if the government had perfected the appeal to which it was statutorily entitled.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973